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No. ~~392~~

In the Supreme Court of the United States

OCTOBER TERM, 1970 70-29

JOHN GIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
ROGER A. PAULEY,
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Attorneys,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 892

JOHN GIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1970. On October 23, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the claim of newly discovered evidence concerning a promise of immunity by a prosecutor to a government witness provides grounds for a new trial.

409-771—70

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transporting forged money orders in violation of 18 U.S.C. 2314 (2 counts) and of conspiracy in violation of 18 U.S.C. 371 (1 count). He was sentenced to five years' imprisonment on each count, two sentences to run concurrently and the third consecutively, but suspended. The conviction was affirmed from the bench on May 19, 1969.

The facts adduced at trial showed that petitioner was the initiator (Tr. 41–42) of a scheme whereby Robert Taliento, a young bank teller, would cash for petitioner stolen Traveller's Express Money Orders (Tr. 181) which had been endorsed with the forged signature of a regular customer of Taliento's bank (Tr. 43). On June 27, 1966, Taliento cashed $2300 in money orders given to him, by petitioner; that night he gave the money to petitioner and received $500 (Tr. 51–53). The next day Taliento gave petitioner $2100 from money orders he had cashed for petitioner and again received $500 (Tr. 24, 59–61). On July 5, 1966, petitioner came to the bank himself and cashed money orders with Taliento worth $3000 (Tr. 63). That same day, the FBI spoke to Taliento and obtained his cooperation in apprehending petitioner (Tr. 65, 185). Taliento called petitioner and arranged to meet him at 11 p.m. (Tr. 186). After they met and began walking up the street, the FBI arrested petitioner, who had $550 in large bills on his person (Tr. 188, 198).

On March 11, 1970, petitioner's motion for a new trial on the basis of newly discovered evidence was denied by the district court. The court of appeals affirmed without opinion. It is from this latter judgment that the instant petition arises.

ARGUMENT

Petitioner argues that evidence of a promise of immunity from prosecution, given to Taliento by an Assistant United States Attorney, should have resulted in a new trial. The promise ((allegedly "discovered" while the case was pending on appeal) was made to Taliento by Assistant United States Attorney Di Paola in the summer of 1966, prior to Taliento's testimony before the federal grand jury and some two years before trial. Di Paola confirmed this arrangement in an affidavit filed by petitioner (A. 33).[1] However, by the time the case came to trial two years later, a new Assistant United States Attorney, Carl Golden, was in charge of the case. He was aware of the fact that Taliento had cooperated and would not, therefore, be indicted. He was not aware that an express promise to that effect had been made (A. 37). Prior to trial Taliento indicated to Golden that he did not want to testify (A. 38) and was told that he had not been granted immunity from prosecution and could still be prosecuted if he did not testify (A. 38);[2] Taliento

[1] "A" refers to appellant's appendix in the court of appeals.

[2] This was correct in fact; Di Paola's affidavit stated that his promise of immunity had been expressly conditioned on petitioner's testifying at trial (A. 33–34).

thereupon agreed to do so on the advice of counsel (A. 40).

At trial, petitioner presented no witnesses; he based his entire case on an attempt to impeach Taliento. His counsel on cross-examination elicited an admission that Taliento had testified before the grand jury in order to help himself (Tr. 80). In response to further questioning, Taliento stated his belief that he could still be prosecuted (Tr. 86–87). That Taliento's testimony was motivated by personal interest was emphasized by defense counsel in his summation (Tr. 221).[3]

On these facts the courts below were correct in ruling that the evidence as to the promise of immunity did not require a new trial. Quite plainly, admission into evidence of a promise of immunity would not have benefited petitioner's case—indeed it might have harmed it. A jury could well conclude that a witness testifying under an absolute promise of immunity would be more likely to be truthful than one who might still be prosecuted and thus fearful of displeasing the government by testifying adversely to its case.

[3] The prosecutor also pointed out in summation that Taliento testified in an attempt to help himself (Tr. 256).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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